Goo Teong Eng v Ng Kim Chuan & Anor

HIGH COURT (TEMERLOH) — SUIT NO 22-30-1993
LOW HOP BING J
17 APRIL 1996

Landlord and tenant *— Controlled premises — Recovery of possession — Non occupation — Premises tenanted to partnership company — Brother of former partner stayed in premises for about 40 years — Paid rent on behalf of company — Present partners not occupants — Whether owner entitled to recover vacant possession — Control of Rent Act 1966 s 16*

Landlord and tenant *— Controlled premises — Lessor of residence — Member of family — 'Brother', whether member of family — Control of Rent Act 1966 s 2*

Words and phrases *— 'Member of the family' — Control of Rent Act 1966 s 2(1)*

In 1992, the plaintiff purchased a rent-controlled premises ('the premises') from a public auction conducted at the High Court. Subsequently, he became the registered proprietor of the premises . At the time of the purchase, the premises was rented to Messrs Swee Eng Bee, a partnership company ('the second defendant'). The partners of the second defendant company then were Mr Haw Chye Hock and Mr Ng Ah Kow. The first defendant, Mr Ng Kim Chuan, stayed at the premises for about 40 years, and was the brother of Mr Ng Han Seng, a partner of the second defendant company from 1 April 1957 until 28 May 1986. The first defendant started paying rental from 1972, on behalf of the second defendant company, although the receipts were issued in the second defendant's name. The defendants refused to vacate, and the plaintiff took out a writ for possession against them ('the first action'). There was evidence that the defendants agreed to vacate, and the plaintiff accordingly withdrew the action. However, the defendants later reneged on their agreement. It followed that the plaintiff took out another writ against them ('the second action'). The defendants contended, inter alia, that they were controlled tenants who were entitled to the protection of the Control of Rent Act 1966 ('the Act') on the grounds that: (i) the defendants and their families had been staying at the premises since 1947 and had been carrying on their business activities there; (ii) the defendants had been paying rental of RM200 per month to the previous registered proprietors; and (c) they had spent about RM20,000 to RM30,000 in renovating and repairing the premises. The defendants further argued that the matter was res judicata as a result of the first action. The plaintiff, however, contended that the defendants were never, at any time controlled tenants, or alternatively, under s 16 of the Act, the plaintiff was legally entitled to recover vacant possession.

Held, allowing the plaintiff's claim:

(1) The first defendant could not inherit or take over the tenancy of controlled premises from his brother, Ng Han Seng. Only a 'member of the family' may so inherit. Under s 2(1) of the Act, this phrase is defined as meaning: (i) husband or widower; or (ii)

wife or widow; or (iii) father or mother; or (iv) son or daughter (see p 37E–H); *Gan Heng Soo v Lee Nyong Tai* [1952] MLJ 161, *Wong Yoon Yar v Lin Yin Thai & Ors* [1987] 2 MLJ 714 *Wagner & Anor v Singam* [1950] MLJ 235 and *Hassan, BT v Scully, GA* [1951] MLJ 141 followed.

(2) Further, the first defendant was not a partner of the second defendant. The first defendant was, under s 8(1) of the Registration of Businesses Act 1956, in no capacity to contract and enter into a tenancy (see p 37I).

(3) In the law of tenancy, a partnership firm may legally hold a tenancy. A tenancy granted to the name of a firm is a tenancy granted to individual partners (see p 38F); *Keow Seong & Co v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103 followed.

(4) The burden was on the defendants to prove that the second defendant company (at the time of its registration as a partnership firm in 1957), had validly inherited a tenancy for controlled premises from their predecessors. However, no evidence was adduced to establish this (see p 38G).

(5) It is trite law that only a person in actual occupation or possession of a controlled premises can enjoy the protection of the Act. In the circumstances, neither Haw Chye Hock nor Ng Ah Kow, the present partners of the second defendant, could now claim the protection of the Act as both are neither in actual occupation nor in possession of the premises (see pp 38I and 39A–C); *Tang Joo Sim v Lee Soo Huang & Ors* [1975] 2 MLJ 15, *Hong Geok Cheng v Jacques, Elizabeth* [1981] 1 MLJ 12, *Wee Ban Yan v Eyun Eng Lowi* [1963] MLJ 62 and *Indo Australian Trading Co Ltd v Lim Hoon & Anor* [1961] MLJ 259 followed.

(6) Non-occupation or possession of the premises is clearly a ground for recovery of controlled premises pursuant to s 16(1)(i) and (2) of the Act. It was therefore clear that the plaintiff was entitled to recover possession under s 16(1)(i) of the Act (see p 39D).

(7) The doctrine of res judicata had no application in this action as the earlier writ of possession filed by the plaintiff had been duly withdrawn and there was no final determination on the facts therein. Therefore, the plaintiff was not precluded from filing this action to recover vacant possession of the premises (see p 40E–G); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 and *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207 followed.

(8) Although the defendants had pleaded in the statement of defence that they had spent some RM20,000 to RM30,000 in renovating the premises, no evidence in the form of receipts or otherwise were adduced to support their contention (see p 40G).

[Bahasa Malaysia summary

Pada tahun 1992, plaintiff telah membeli sebuah premis sewa terkawal ('premis tersebut') daripada lelongan awamyang dijalankan di

Mahkamah Tinggi. Dia kemudiannya menjadi pemunya berdaftar premis tersebut. Pada masa pembelian, premis tersebut telah disewakan kepada Tetuan Swee Eng Bee, satu syarikat perkongsian ('defendan kedua'). Rakan kongsi syarikat defendan kedua sebelum ini adalah Encik Haw Chye Hock dan Encik Ng Ah Kow. Defendan pertama, Encik Ng Kim Chuan, telah menetap di premis tersebut selama lebih kurang 40 tahun, dan merupakan adik lelaki kepada Encik Ng Han Seng, rakan kongsi syarikat defendan kedua daripada 1 April 1957 hingga 28 Mei 1986. Defendan pertama mula membayar sewa dari tahun 1972, mewakili syarikat defendan kedua, walaupun resit dikeluarkan atas nama defendan kedua. Defendan enggan mengosongkan premis tersebut, dan plaintif mengeluarkan writ untuk milikan terhadap defendan ('tindakan pertama'). Terdapat bukti bahawa defendan bersetuju untuk mengosongkan premis tersebut, dan ekoran itu plaintif menarik balik tindakan itu. Bagaimanapun, defendan kemudiannya memungkiri perjanjian mereka. Ekoran itu, plaintiff mengeluarkan writ yang lain terhadap mereka ('tindakan kedua'). Defendan menegaskan, antara lain, bahawa mereka adalah penyewa terkawal yang berhak mendapat perlindungan daripada Akta Kawalan Sewa 1966 ('Akta tersebut') atas alasan bahawa: (i) defendan dan keluarga mereka telah menetap di premis tersebut semenjak tahun 1947 dan telah menjalankan kegiatan perniagaan mereka di situ; (ii) defendan telah membayar sewa sebanyak RM200 sebulan kepada pemunya berdaftar sebelum ini; dan (iii) mereka telah menghabiskan lebih kurang RM20,000 sehingga RM30,000 untuk mengubah-suai dan membaiki premis tersebut. Defendan selanjutnya berhujah bahawa perkara ini adalah res judicata akibat daripada tindakan pertama. Plaintif, bagaimanapun, menegaskan bahawa defendan tidak pernah, pada bila-bila masa penyewa terkawal, atau sebagai alternatif, di bawah s 16 Akta tersebut, plaintif adalah berhak di sisi undang-undang untuk mendapatkan milikan kosong

Diputuskan, membenarkan tuntutan plaintif:

(1) Defendan pertama tidak boleh mewarisi atau mengambil alih penyewaan premis terkawal daripada abangnya, Ng Han Seng. Hanya 'ahli daripada keluarga' boleh mewarisi. Di bawah s 2(1) Akta tersebut, frasa ini ditakrifkan sebagai: (i) suami atau duda; atau (ii) isteri atau balu; atau (iii) bapa atau ibu; atau (iv) anak lelaki atau anak perempuan (lihat ms 37E–H); *Gan Heng Soo v Lee Nyong Tai* [1952] MLJ 161, *Wong Yoon Yar v Lin Yin Thai & Ors* [1987] 2 MLJ 714, *Wagner & Anor v Singam* [1950] MLJ 235 and *Hassan, BT v Scully, GA* [1951] MLJ 141 diikut.

(2) Selanjutnya, defendan pertama bukan rakan kongsi defendan kedua. Defendan pertama, di bawah s 8(1) Akta Pendaftaran Perniagaan 1956, tidak mempunyai keupayaan untuk mengikat kontrak dan untuk memasuki penyewaan (lihat ms 37I)

(3) Mengikut undang-undang penyewaan, firma perkongsian boleh memegang penyewaan secara sah di sisi undang-undang.

Penyewaan yang diberikan atas nama sesebuah firma ialah penyewaan yang diberikan kepada rakan kongsi secara individu (lihat ms 38F); *Keow Seong & Co v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103 diikut.

(4) Beban adalah ditanggung oleh defendan untuk membuktikan bahawa syarikat defendan kedua (pada masa pendaftarannya sebagai firma perkongsian pada tahun 1957), telah secara sah mewarisi penyewaan untuk premis terkawal daripada pendulu mereka. Walau bagaimanapun, tidak ada bukti yang telah dikemukakan untuk menyokong ini (lihat ms 38G).

(5) Adalah merupakan undang-undang mantap bahawa hanya seseorang yang merupakan penghuni atau pemilik sebenar premis terkawal boleh mendapatkan perlindungan Akta tersebut. Dalam keadaan ini, Haw Chye Hock atau Ng Ah Kow, rakan kongsi defendan kedua pada masa ini, tidak boleh menuntut perlindungan Akta tersebut sekarang kerana kedua-dua mereka bukan penghuni atau pemilik sebenar premis tersebut (lihat ms 38I dan 39A–C); *Tang Joo Sim v Lee Soo Huang & Ors* [1975] 2 MLJ 15, *Hong Geok Cheng v Jacques, Elizabeth* [1981] 1 MLJ 12, *Wee Ban Yan v Eyun Eng Lowi* [1963] MLJ 62 dan *Indo Australian Trading Co Ltd v Lim Hoon & Anor* [1961] MLJ 259 diikut.

(6) Adalah nyata bahawa ketiadaan penghuni atau pemilik premis merupakan satu alasan untuk mendapatkan kembali premis terkawal mengikut s 16(1)(i) dan (2) Akta tersebut. Oleh itu, jelas bahawa plaintif berhak untuk mendapatkan kembali milikan di bawah s 16(1)(i) Akta tersebut (lihat ms 39I).

(7) Doktrin res judicata tidak terpakai dalam tindakan ini kerana writ milikan terdahulu yang difailkan oleh plaintif telah ditarik balik sepenuhnya dan tidak ada keputusan akhir atas fakta-fakta di dalamnya. Oleh itu, plaintif tidak dikecualikan daripada memfailkan tindakan ini untuk mendapatkan kembali milikan kosong premis tersebut (lihat ms 40E–G); *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 dan *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207 diikut.

(8) Walaupun defendan telah memplid dalam pernyataan pembelaan bahawa mereka telah menghabiskan sejumlah RM20,000 hingga RM30,000 untuk mengubah-suai premis tersebut, tidak ada bukti dalam bentuk resit atau sebaliknya yang dikemukakan untuk menyokong kenyataan mereka (lihat ms 41G).]

[*Editorial Note*: The defendant had applied for leave to appeal to the Court of Appeal vide Civil Application No C–08–207–96.]

Notes

For cases on controlled premises, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 30–779.

Cases referred to

Hassan, BT v Scully, GA [1951] MLJ 141
Gan Heng Soo v Lee Nyong Tai [1952] MLJ 161
Hong Geok Cheng v Elizabeth Jacques [1981] 1 MLJ 12
Indo Australian Trading Co Ltd v Lim Hoon & Anor [1961] MLJ 259
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119
Keow Seong & Co v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered [1983] 2 MLJ 103
Tang Joo Sim v Lee Soo Huang & Ors [1975] 2 MLJ 15
United Commercial Bank v Yap Cheng Hai & Ors [1980] 1 MLJ 207
Wagner & Anor v Singam [1950] MLJ 235
Wee Ban Yan v Eyun Eng Lowi [1963] MLJ 62
Wong Yoon Yar v Lin Yin Thai & Ors [1987] 2 MLJ 714

Legislation referred to

Control of Rent Act 1966 ss 2(1), 16
Control of Rent Ordinance 1948 s 2
Registration of Business Act 1956 ss 8(1), 12(1)(6)

CY Chung (*KC Yap Kamaluddin & Partners*) for the plaintiff
Ramachelvam (*Zuki Gandhi & Amin*) for the defendant

Cur Adv Vult

Low Hop Bing J (delivering the judgment of the court): This is a claim by the plaintiff against the defendants for vacant possession of the premises at No 2, Jalan Besar, 27000 Jerantut, Pahang ('the premises') and mesne profit.

The plaintiff is the purchaser of the premises at a public auction held on 23 November 1991 at the Kuala Lumpur High Court and was subsequently registered as the proprietor on 8 April 1992. At the time of the purchase, the plaintiff knew that the premises had been tenanted to the second defendant, Tetuan Swee Eng Bee, as this was stated in the proclamation of sale.

The controlled status of the premises is not in dispute. The defendants claim that statutorily they are controlled tenants who are entitled to the protection of the Control of Rent Act 1966 ('the Act'), on the grounds that:

(a) the defendants and their families have been staying at the premises since 1947 and have been carrying on their business activities there;

(b) the defendants have been paying rental of RM200 per month to the previous registered proprietors; and

(c) the defendants have spent money amounting to RM20,000 or RM30,000 in renovating and repairing the premises.

The plaintiff contended that the defendants were never, at any time, controlled tenants or alternatively, under s 16 of the Act, the plaintiff is legally entitled to recover vacant possession.

Prior to the plaintiff, the registered proprietors were:

(a) Superb Credit Corp (M) Sdn Bhd (from 11 December 1980 till 7 April 1992);

(b) Tan Lai Eng (⅓ share), Tan Ting Tiam (⅓ share) and Tan Teng Chai (⅓ share) (from 10.30am till 10.40am on 11 December 1980);

(c) Ng Chor Teng (from 22 October 1953 till 11 December 1980); and

(d) Teo Chew Kok (from 6 November 1947 till 22 October 1953).

The plaintiff's solicitors have sent the requisite notices of vacant possession to the defendant on 1 March 1993, addressed to the defendants' former solicitors, Messrs Lim Cheng Poh, Lim & Rahim and another letter on 11 August 1993, addressed to the second defendant.

The first defendant, Ng Kim Chuan, is 48 years of age and has been staying at the premises for about 40 years, initially with his parents and members of his family. He started paying rental from 1972, on behalf of the second defendant, a partnership firm, although the first defendant was never a partner there. Receipts were issued in the second defendant's name and no tenancy existed between the first defendant and any of the former proprietors.

In my judgment, the first defendant could not inherit or take over the tenancy of controlled premises from his brother, Ng Han Seng. Only a 'member of the family' may so inherit. Under s 2(1) of the Act, this phrase is defined as meaning:

(i) husband or widower; or

(ii) wife or widow; or

(iii) father or mother; or

(iv) son or daughter.

In *Gan Heng Soo v Lee Nyong Tai* [1952] MLJ 161, a brother was held not to be included in the definition of a 'member of the family' pursuant to s 2 of the Control of Rent Ordinance 1948.

In *Wong Yoon Yar v Lin Yin Thai & Ors* [1987] 2 MLJ 714, the Supreme Court held, inter alia, that only a 'member of the family' of the deceased and living with the deceased on the premises at the time of death could claim the protection of the Act.

Hence, it is abundantly clear that only the specified near relation as defined in s 2 can inherit or take over the tenancy of controlled premises, and a brother or a sister could not do so (see *Wagner & Anor v Singam* [1950] MLJ 235 and *Hassan, BT v Scully, GA* [1951] MLJ 141).

Further, the first defendant was not a partner of the second defendant. The first defendant was, under s 8(1) of the Registration of Businesses Act 1956, in no capacity to contract and enter into a tenancy. The relevant portion of s 8(1) provides as follows:

> 8(1) So long as the prescribed particulars in respect of any person who is or who claims to be an associate of any business are not recorded in the register, no right of such person under or arising out of any contract

made or entered into by or on behalf of any person in relation to such business shall be enforceable by suit or other legal proceeding either in the name of such business or in his individual name.

The official search into the partnership firm, ie the second defendant, revealed that the present partners are:

(a) Haw Chye Hock, with effect from 28 May 1986; and

(b) Ng Ah Kow, with effect from 23 December 1971.

The former partners of the second defendant, were:

(a) Ng Han Seng, with effect from 1 April 1957 until 28 May 1986;

(b) Ong Wan, with effect from 1 April 1957 until 28 May 1986; and

(c) How Teck Lee, with effect from 21 December 1970 until 28 May 1986.

The first defendant testified that the present and former partners of the second defendant are related and/or connected viz:

(a) Mr Haw Chye Hock is his brother-in-law;

(b) Mr Ng Ah Kow is his nephew and the son of Mr Ng Han Seng;

(c) Mr Ng Han Seng is his brother;

(d) Mr Ong Wan (now deceased) was a former partner of Mr Ng Han Seng;

(e) Mr How Teck Lee was a former partner of Mr Ng Han Seng.

In the law of tenancy, a partnership firm may legally hold a tenancy, for example, a tenancy granted to the name of a firm is a tenancy granted to individual partners. (See RR Sethu on *Rent Control Legislation in Malaysia* at p 91 and *Keow Seong & Co v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered* [1983] 2 MLJ 103). Hence, in the instant case, the tenancy was in effect granted to the individual partners of the second defendant.

The defendants have pleaded in their defence that they and their families have resided on the premises as tenants since 1946. The burden is on the defendants to prove that the partners of the second defendant (at the time of its registration as a partnership firm in 1957), had validly inherited a tenancy for controlled premises from their predecessors. No evidence was adduced to establish this.

When the plaintiff became the registered proprietor in 1992, the partners of the second defendant were Haw Chye Hock and Ng Ah Kow. Ng Ah Kow has testified that he has stopped occupying the premises since 1975. Haw Chye Hock has neither occupied nor taken possession thereof. Both of them were not involved in the control or management of the day-to-day business of the second defendant.

It is trite law that only a person in actual occupation or possession of a controlled premises can enjoy the protection of the Act (see *Tang Joo Sim v Lee Soo Huang & Ors* [1975] 2 MLJ 15). The Federal Court in *Hong Geok Cheng v Jacques, Elizabeth* [1981] 1 MLJ 12; the Kota Bharu High Court in *Wee Ban Yan v Eyun Eng Lowi* [1963] MLJ 62 and the Singapore

A High Court in *Indo Australian Trading Co Ltd v Lim Hoon & Anor* [1961] MLJ 259, have consistently held that a widow can only inherit a tenancy for controlled premises if she was residing with her husband at the premises at the time of the death of the deceased. The intention of Parliament in enacting rent control legislation was to protect genuine tenants, who were B in need of a place to stay and to carry on their businesses, and who could not otherwise afford the normal rents in the open market. The courts have therefore reflected the intention of Parliament in requiring tenants to show actual occupation or possession of controlled premises, before they could be endowed with the protection granted by the Act. In the circumstances, neither Haw Chye Hock nor Ng Ah Kow, the present partners of the C second defendant, can now claim the protection of the Act as both are neither in actual occupation nor possession of the premises. The photographs tendered by the plaintiff clearly showed that even the signboard 'Swee Eng Bee' is not affixed to the premises and that the signboard on the shopfront merely shows 'Sports Toto'.

D Non-occupation or possession of the premises is clearly a ground for recovery of controlled premises pursuant to s 16(1)(i) and (2) of the Act, the relevant portion of which reads as follows:

> 16 (1) ... no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy E shall be made or given by the court except in any of the following cases:
>
> (i) where neither the tenant nor any member of his family is personally in occupation of the controlled premises or any part thereof.

F It is therefore clear that the plaintiff is entitled to recover possession under s 16(1)(i) of the Act, since both the present partners of the second defendant are not in actual occupation or possession of the premises.

The defendants had actually agreed to vacate the premises at the time a writ of possession was taken out by the plaintiff against them, G pursuant to Kuala Lumpur High Court Originating Summons No 31–2007–86 (A/E No 37–50–92). There was evidence that one Ng How Aun ('SD3') had actual and/or ostensible authority of the first defendant to agree to vacate the premises on his behalf. This was confirmed by the former OCPD of Jerantut, Encik Abdul Ghani bin Abdul Rahman ('SP2') and the bailiff's report which was signed by the plaintiff, the former OCPD H of Jerantut, the court bailiff, the senior assistant registrar of the Temerloh High Court and Mr Apparao a/l Appana, a clerk representing the plaintiff's solicitors and also by a letter dated 3 September 1992 written by the former OCPD of Jerantut to the plaintiff's solicitors. This was further duly confirmed by the defendant's former solicitors, Messrs Lim Cheng Poh, I Lim & Rahim in a letter dated 11 May 1992 to the plaintiff's solicitors. Notwithstanding all these circumstances and confirmations, the defendants had reneged on their agreement.

Further, the second defendant had failed to register itself as a business since 22 July 1987, in contravention of s 12(1)(b) of the Registration of Businesses Act 1957, which reads as follows:

12 (1) Any person who ...

(a) .....

(b) continues to carry on any business after the certificate of registration issued in respect thereof has expired;

shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding one thousand ringgit or both.

The second defendant has, in the circumstances, been conducting its business on the premises illegally since 1987. This conduct exposes the partners to an imprisonment or a fine or both, and entitles the plaintiff to recover vacant possession under s 16 (1)(d) or (k) of the Act. In order to salvage this position, the second defendant effected a payment of the compound and renewal fee on 27 October 1995, which was clearly an afterthought, in response to the issue of illegality raised by the plaintiff's solicitors. Such afterthought lacks good faith.

The defendants have raised res judicata on the ground that the writ of possession issued by the plaintiff pursuant to the order for sale dated 16 July 1987 in Kuala Lumpur High Court Originating Summons No 31–2007–88 (A/E No 37–50–92) against the defendants has been withdrawn. The plaintiff submitted that the doctrine of res judicata does not apply. In my judgment, I find that the defendants' contention is devoid of merits. In *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, the Supreme Court held that in order to invoke the doctrine of res judicata, the earlier proceedings must have resulted in a final judgment or decree. In *United Commercial Bank v Yap Cheng Hai & Ors* [1980] 1 MLJ 207, the Singapore High Court held that there must be a judgment on the issues that are before the court before the doctrine can arise. In my considered view, the doctrine has no application in this action as the earlier writ of possession filed by the plaintiff in Kuala Lumpur High Court Originating Summons No 31–2007–88 (A/E No 37-50-92) has been duly withdrawn and there was no final determination on the facts therein. Therefore, the plaintiff is not precluded from filing this action to recover vacant possession of the premises.

Although the defendants have pleaded in the statement of defence that they have spent some RM20,000 to RM30,000 in renovating the premises, no evidence in the form of receipts or otherwise were adduced to support their contention.

By reason of the foregoing, I give judgment for the plaintiff as prayed in the statement of claim.

The defendants' counterclaim has not been established and is hereby dismissed with costs.

Order accordingly.

Reported by Isabel Liong